Filed 10/27/16 P. v. Mills CA4/2
See Concurring and Dissenting Opinion
Prior 10/21/16 opinion vacated

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DWAYNE KEVIN MILLS, Defendant and Appellant.	E064610 (Super.Ct.No. SWF1403242) OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge. Affirmed.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and A. Natasha Cortina and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dwayne Kevin Mills challenges the denial of his petition to have his 2014 conviction for unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)) designated as a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act. (Pen. Code, § 1170.18, subd. (f).) He contends that the statutory language added by Proposition 47 requires that he be deemed eligible for relief. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS

On December 15, 2014, defendant pled guilty to a felony count of unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)), admitted a prison prior offense (Pen. Code, § 667.5, subd. (b)), and was sentenced to four years in county jail, with one year suspended (Pen. Code, § 1170, subd. (h)).

On March 12, 2015, defendant filed a petition seeking to have his conviction designated as a misdemeanor pursuant to Proposition 47.[1] The People responded that a Vehicle Code section 10851 offense is not a qualifying felony. On August 26, 2015, the trial court denied the petition on the ground that "10851(a) VC is not a qualifying felony." (Some capitalization omitted.)

II. DISCUSSION

The issue of whether a felony conviction under Vehicle Code section 10851 comes within the ambit of Proposition 47 is one that has divided the Courts of Appeal, and

[1] Although the petition referred only to convictions from past cases in 1982, 1983, 1985 and 2009, the trial court deemed the petition as a request for resentencing on the felony conviction in this case for violating Vehicle Code section 10851, subdivision (a).

which the California Supreme Court will decide.[2] Recognizing that reasonable minds can differ on this matter, pending the Supreme Court's decision, we will adhere to this court's previous analysis: a defendant convicted of violating Vehicle Code section 10851 is ineligible for resentencing under Proposition 47 as a matter of law, regardless of the facts of the crime.

"Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Proposition 47 provides retrospective relief for defendants who are either serving a sentence or have completed a sentence for a prior conviction, if the prior conviction would have been a misdemeanor under Proposition 47 had it been in effect at the time of the offense. (Pen. Code, § 1170.18, subds. (a), (f).)

Vehicle Code section 10851 is a "wobbler" offense, punishable either as a felony or a misdemeanor. (Veh. Code, § 10851, subd. (a); see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974, fn. 4 [listing Vehicle Code section 10851, as a statute that proves for "alternative felony or misdemeanor punishment"].) The statutory

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[2] The issue of whether Proposition 47 applies to a section 10851 conviction is before the California Supreme Court in *People v. Page* (2015) 241 Cal.App.4th 714, review granted January 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted March 9, 2016, S232250; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344; *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150; and *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041.

language setting the punishment for violations of Vehicle Code section 10851 remains the same, before and after Proposition 47, and is not included among the enumerated sections amended or added by Proposition 47. (Veh. Code, § 10851, subd. (a); see Pen. Code, § 1170.18, subd. (a).) We therefore cannot say that defendant's Vehicle Code section 10851 conviction would have been a misdemeanor had Proposition 47 been in effect at the time of the offense. It follows that defendant's conviction is ineligible for designation as a misdemeanor under Penal Code section 1170.18.

Defendant contends that Vehicle Code section 10851 falls within the scope of Penal Code section 490.2, added by Proposition 47, which provides as follows: "Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (Pen. Code, § 490.2, subd. (a).) Defendant reads this language as broad enough to encompass all low-level (less than $950) thefts committed by defendants with no disqualifying prior convictions, and that any taking, whether with or without the intent permanently to deprive, is a theft offense within the meaning of Proposition 47.

We disagree. Penal Code section 490.2 redefines a limited subset of offenses that would have formerly been grand theft to be petty theft; however, it neither redefines nor establishes a substantive theft offense. Rather, Penal Code section 484, subdivision (a), defines theft; to steal or obtain property by theft, a defendant must take the property with the specific intent to permanently deprive the owner of possession. When the stolen

property does not exceed $950, Penal Code section 490.2 reclassifies the theft to be petty theft. Thus, when a defendant is charged with either grand theft or petty theft of an automobile, the prosecution must prove that defendant intended to permanently deprive the owner of possession.

In contrast, Vehicle Code section 10851 may be violated either by taking a vehicle with intent to steal it, or by driving it with the intent only to temporarily deprive the owner of its possession. (*People v. Garza* (2005) 35 Cal.4th 866, 876.) Depending on circumstances, a violation of Vehicle Code section 10851 may or may not be treated as a "theft conviction" for certain purposes. (*Garza*, *supra*, at p. 871.) Nevertheless, Vehicle Code section 10851 does not itself proscribe theft of either the grand or petty variety, but rather the action of taking or driving a vehicle "with or without intent to steal." (Veh. Code, § 10851, subd. (a).) It therefore does not fall within the scope of Penal Code section 490.2.

Our analysis is supported by the circumstance that a statute amended by Proposition 47 explicitly treats Vehicle Code section 10851 convictions as separate from either grand or petty theft convictions. Proposition 47 amended Penal Code section 666, petty theft with a prior. (Pen. Code, § 666, see also Pen. Code, § 1170.18, subd. (a) [listing Pen. Code § 666 as among those sections amended or added by Proposition 47].) Eligible predicates include prior convictions for "petty theft, grand theft . . . auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery," and receiving stolen property. (Pen. Code, § 666, subd. (a).) The inclusion of "auto theft under Section 10851 of the Vehicle Code" alongside "grand theft" and "petty theft" in a statute

explicitly amended by Proposition 47 is a significant indication that Vehicle Code section 10851 convictions are not properly treated as either grand theft or petty theft convictions, for purposes of the Proposition 47 analysis. Thus, the trial court properly found that Vehicle Code section 10851 convictions are ineligible for resentencing under Proposition 47.

Even if we were to agree that a Vehicle Code section 10851 conviction could be eligible for resentencing, it remains defendant's burden to have produced facts establishing his eligibility, including the value of the car at issue, and that the conviction was indeed for a theft, not a joyride—assuming that there is some way in which he can establish that his conviction was for a car theft when that was not a necessary element. (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448-450; *People v. Perkins* (2016) 244 Cal.App.4th 129, 136-137; *People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.) Defendant's petition failed to satisfy this burden, providing no evidence of eligibility. (See *People v. Sherow*, *supra*, at p. 880 [proper petition could contain at least declaration from defendant regarding circumstances of offense].) Therefore, the trial court did not err in denying relief on this conviction.

III. DISPOSITION

The order appealed from is affirmed.

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HOLLENHORST
Acting P. J.

I concur:

CODRINGTON
J.

[*People v. Mills*, E064610]

MILLER, J., Dissenting and Concurring

I respectfully dissent to that part of the majority opinion finding that Proposition 47 does not apply to all convictions under Vehicle Code section 10851. Some convictions of Vehicle Code section 10851 constitute theft offenses. (*People v. Garza* (2005) 35 Cal.4th 866, 881.) Assuming that a defendant takes a vehicle with the intent to permanently deprive the owner of the vehicle and it is valued under $950, such violation would constitute a violation of Penal Code section 490.2, petty theft, which was added by Proposition 47.

I concur in the result that defendant's petition to recall his sentence was properly denied by the trial court as defendant failed to meet his burden of establishing the vehicle he took was valued under $950, and that he intended to permanently deprive the owner of the vehicle.

MILLER
J.